

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

In Re: *Enforcement of Interconnection Agreement between BellSouth
Telecommunications, Inc. and XO Tennessee, Inc.*

Docket No. 02-01204

TN REGULATORY AUTHORITY
DOCKET ROOM

ANSWER AND COUNTER-COMPLAINT OF XO TENNESSEE, INC.

XO Tennessee, Inc. ("XO"), hereby files this Answer to the above-captioned Complaint and Counter-Complaint to enforce the audit provisions in Section 1.4 of the Amendment executed September 8, 2000, to XO's Interconnection Agreement with BellSouth Telecommunications, Inc. ("BellSouth").

Pursuant to Section 1.4, entitled "Special Access Service Conversions," BellSouth may conduct audits of special access circuits converted to unbundled loop and transport combinations, or Enhanced Extended Loops ("EELs") only "as reasonably necessary" to determine whether those circuits meet the significant local use requirements set forth in the Federal Communications Commission's ("FCC") June 2, 2000 Supplemental Order Clarification.¹ Upon receiving BellSouth's April 26, 2002 letter demanding an immediate audit of all EELs in all states, XO immediately agreed to meet with BellSouth personnel and the proposed auditor to discuss the parameters and logistics of an audit. A number of concerns were identified in that meeting, and XO requested, both verbally and in repeated correspondence, information consistent with the terms and conditions of the audit provisions and the FCC Order. BellSouth has declined to provide such information,

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Docket No. 96-98, Supplemental Order Clarification, FCC 00-183, 15 FCC Rcd 9587 (released June 2, 2000) ("Supplemental Order Clarification").

and has declined to cooperate with XO to determine whether any legitimate basis for an audit exists.

XO requests that BellSouth's Complaint be dismissed, and that the audit provisions referenced above be appropriately enforced. Further, to prevent BellSouth from using similar tactics in the future, which XO believes are intended to burden CLECs with unreasonable audit demands, XO requests that the Authority require BellSouth provide the Authority notice of any future audit requests, along with the reason(s) therefore.

ANSWER: SPECIFIC RESPONSES

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted. XO's representative for purposes of this proceeding is:

Dana Shaffer
XO Tennessee, Inc.
105 Molloy Street, Suite 300
Nashville, TN 37201
615-777-7700

5. Admitted.
6. Admitted in part; denied in part: XO has attempted to resolve this matter informally, but has been unable to do so because BellSouth has refused to abide by the requirements of the FCC's Supplemental Order Clarification and the audit provisions of the parties' Interconnection Agreement.

7. Admitted.

8. Admitted.

9. Denied. Section 1.4 of the September 8, 2000 Amendment to the parties' Interconnection Agreement does not give Bell unfettered discretion "upon 30 days written notice to XO, to conduct an audit of XO's records to verify the type of traffic being transmitted over combinations of loop and transport network elements purchased by XO from BellSouth..." (BellSouth Complaint at para. 8, page 4). Section 1.4 provides for the audit of converted circuits only, as "reasonably necessary," and requires BellSouth to provide XO "and the FCC at least thirty days notice of any such audit" and to "hire an independent auditor to perform such audit." The complete language of section 1.4 is attached hereto as Exhibit 1.

10. Admitted in part, denied in part. BellSouth has requested an audit of circuits initially ordered by XO as special access and later converted to EELs. Although BellSouth demanded an audit of all EELs, some of which were ordered directly as EELs and others which were converted from special access, the only facilities properly subject to the audit provision are those that were purchased as special access facilities then subsequently converted to EELs.

11. Admitted. The UNE rate is less than the special access rate for the same circuit.

12. Denied. The audit provisions are set forth in Section 1.4, not section 1.4.1. Section 1.4, entitled "Special Access Service Conversions," clearly provides that

the only facilities subject to the audit provision are those that were purchased as special access facilities, then subsequently converted to EELs.

13. Denied. The notice provision also requires notice to the FCC. XO has requested proof of such notice, as well as information sufficient to determine compliance with the audit provisions set forth in Section 1.4. BellSouth has declined to provide such information.

14. Denied. XO has raised significant issues regarding BellSouth's audit request that must be resolved prior to the initiation of any audit.

15. Denied. XO has not demanded a reason "satisfactory to XO" prior to the initiation of the audit. XO has merely requested an objective showing of any concern or reasonable need for an audit. BellSouth has refused to provide such information.

16. Admitted in part; denied in part. Section 1.4 clearly requires that BellSouth hire an independent auditor to conduct such audit. The auditor hired by BellSouth has refused to provide certain information to XO, and has, at all times, acted as confidential advisor to BellSouth, rather than an independent auditor hired to objectively review information. Based on information currently available to XO about the proposed auditor, XO does not believe that the auditor fairly can be characterized as independent.

17. Denied. The audit provision of XO's Interconnection Agreement and, more importantly, the facts presented here are not the same as those in the NuVox case in Georgia. Moreover, the Hearing Officer's decision in that case is not a final Georgia Commission order and is currently subject to an application to modify or reverse that will

be considered by the full Georgia Commission. Even assuming the Hearing Officer's decision on that case was well founded, this case simply does not present the same set of circumstances.

18. Admitted in part; denied in part. XO has raised a number of other issues of concern, which BellSouth has declined to address. BellSouth's failure to cooperate with reasonable requests for information and/or interpretation go to the very heart of the issue of whether BellSouth is acting in good faith in requesting the audit, and, thus, are directly relevant to the commencement of the audit.

19. Denied. The parties' contractual rights are clear from the language of the Interconnection Agreement and the FCC's Order.

COUNTER-COMPLAINT

ALLEGATIONS

1. The statements regarding the identification of Parties and Jurisdiction set forth in BellSouth's Complaint, as modified in XO's answer, above, are incorporated by reference as if stated herein.

2. XO and BellSouth are parties to an Interconnection Agreement, which was entered into between the parties on November 4, 1999.

3. The FCC's UNE Remand order was released June 2, 2000. XO immediately requested access to EELs and conversion of special access circuits to EELs, from BellSouth. In order to obtain access to EELs, however, XO was required by

BellSouth to "negotiate" an amendment to the interconnection agreement. Such "negotiation" took months, during which time XO was denied access to EELs.

4. The amendment was finally executed between the parties on September 8, 2000. BellSouth, however, then further delayed XO's requested conversion of special access circuits to EELs. BellSouth even threatened XO with a penalty charge for any circuit converted which was clearly inapplicable. BellSouth's actions were intended to delay and discourage XO's request for conversion of these circuits. BellSouth, eventually, changed its position with regard to application of the penalty and completed the conversion but only after lengthy discussions, and XO's challenge of representations BellSouth had made to the FCC with regard to its conduct in providing CLECs access to EELs. The requested conversions were not completed until May, 2001, almost a year after the original request.

5. Section 1.4 of the September 8, 2000 Amendment provides for the audit of converted EELs by an independent auditor, as "reasonably necessary" to ensure compliance with the terms and conditions set forth for such conversions.

6. On April 26, 2002, BellSouth sent a letter to XO demanding an immediate audit of all EELs, new and converted, purchased from BellSouth by any and all XO affiliates. This letter was the first notice from BellSouth indicating its desire to audit XO's use of EELs.

7. XO met with BellSouth personnel in charge of the proposed audit and with the proposed auditors via teleconference on May 15, 2002.

8. On that call, BellSouth and its auditor were unable or unwilling to answer XO's questions with regard to a number of issues. After several attempts to obtain this information, including direct correspondence with the auditors, XO sent a letter to BellSouth on May 29, 2002, listing its concerns and requesting information regarding the XO affiliates to be audited, the independence of the auditor, the stated concern to justify the audit(s), and the appropriate scope of the audit.

9. BellSouth responded, incorrectly indicating that, had XO agreed to a meeting, "[m]ost of the information [XO] requested would have been covered at that meeting." XO responded that it had in fact, agreed to and attended a meeting, but that the concerns presented in that meeting were not adequately addressed, nor was the requested information provided.

10. The parties continued to exchange correspondence, and scheduled another meeting to discuss the concerns raised. On September 25, 2002, at 8:30 am, the parties met via teleconference.

11. Despite XO's repeated attempts to work with BellSouth to conduct an audit pursuant to the audit provisions of the parties' Interconnection Agreement and the FCC's Supplemental Order Clarification, BellSouth has failed to produce any reasonable basis for the audit; has refused to work with XO to conduct an initial sampling of circuits to determine whether any potential problem exists; has instructed the auditor not to provide full information relating to the independence of the auditor; and has insisted on a full "across the board" audit of all EELs, including those not subject to the audit provisions of Section 1.4 of the parties' Interconnection Agreement.


12. BellSouth has refused to abide by the terms of the parties' Interconnection Agreement and the terms of the FCC's Supplemental Order Clarification, which seeks to prevent a large incumbent provider from doing exactly what BellSouth seeks to do: further burden the internal resources of CLECs with overly broad, unsubstantiated audit demands.

WHEREFORE, XO requests that the Authority:

1. Dismiss or deny BellSouth's Complaint and all of the relief sought therein;
2. Enter an order declaring that BellSouth has breached its Interconnection Agreement with XO by failing to comply in good faith with the audit provisions thereof;
3. Enter an order appropriately confirming the limits of the audit rights granted in Section 1.4, and requiring BellSouth to present list of specific converted circuits it seeks to audit and a reasonable basis for the audit of each of the specific converted EELs;
4. Enter an order requiring BellSouth to cease and desist the anticompetitive practice of demanding broad, sweeping audits and/or billing adjustments without proper justification therefore, and requiring BellSouth to provide notice to this Authority of any future audit demands/requests served upon any CLEC in Tennessee; and
5. Grant XO such other and further relief as the Authority deems fair and equitable.

Respectfully submitted,

XO Tennessee, Inc.

by permission

Dana Shaffer

105 Molloy Street, Suite 300

Nashville, TN 37201

Phone: 615-777-7700

Facsimile: 615-345-1564

Counsel for XO Tennessee, Inc.

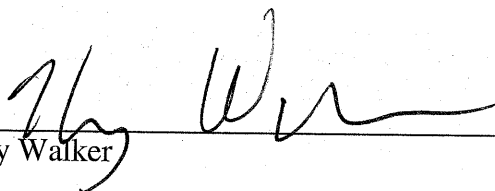
December 5, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 5th day of December, 2002.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201-3300

R. Douglas Lackey, Esq.
675 Peachtree St., NE, Suite 4300
Atlanta, GA 30375



Henry Walker

ATTACHMENT

**AMENDMENT
TO THE INTERCONNECTION
AGREEMENT BETWEEN
NEXTLINK TENNESSEE, INC. AND
BELL SOUTH TELECOMMUNICATIONS, INC.
DATED November 4, 1999**

Pursuant to this Agreement, (the "Amendment"), NEXTLINK Tennessee, Inc. ("NEXTLINK"), and BellSouth Telecommunications, Inc. ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated November 4, 1999 and approved by the Tennessee Regulatory Authority March 28, 2000 (the "Agreement").

WHEREAS, BellSouth and NEXTLINK entered into the Agreement in the state of Tennessee and;

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. Enhanced Extended Link
 - 1.1 Where facilities permit and where necessary to comply with an effective FCC and/or State Commission order, BellSouth shall offer access to the Enhanced Extended Link ("EEL") as defined in Section 1.2 below.
 - 1.2 Definitions
 - 1.2.1 For purposes of this Amendment, references to "Currently Combined" network elements shall mean that such network elements are in fact already combined by BellSouth in the BellSouth network to provide service to a particular end user at a particular location.
 - 1.2.2 BellSouth will provide access to the Enhanced Extended Link ("EEL") in the combinations set forth in 1.3 following, and subject to the terms and conditions set forth in 1.4.1 below. This offering is intended to provide connectivity from an end user's location through that end user's SWC and then connected to the NEXTLINK's POP serving wire center. Except as otherwise explicitly set forth herein, the circuit must be connected to NEXTLINK's switch for the purpose of provisioning telephone exchange service to NEXTLINK's end user customers. This can be done either in the collocation space at the POP SWC, or by using BellSouth's access facilities between the NEXTLINK's POP and NEXTLINK's collocation space at the POP SWC, as stated in 1.4.1 below.

1.2.3 BellSouth shall make available to NEXTLINK those EEL combinations and transport described in Section 1.3 below only to the extent such combinations of loop and transport network elements are Currently Combined. In addition, BellSouth will make available new combinations of loops and transport network elements in Density Zone 1, as defined in 47 C.F.R 69.123 as of January 1, 1999, in the Atlanta, GA; Miami, FL; Orlando, FL; Fort Lauderdale, FL; Charlotte-Gastonia-Rock Hill, NC; Greensboro-Winston Salem-High Point, NC; Nashville, TN; and New Orleans, LA, Except as stated above, other combinations of network elements will be provided to NEXTLINK only to the extent such network elements are Currently Combined.

1.2.4 Additionally, there may be instances wherein NEXTLINK will require multiplexing functionality. BellSouth will provide access to multiplexing within the central office pursuant to the terms, conditions and rates set forth in its Access Services Tariffs when the customer utilizes special access interoffice facilities. Multiplexing will be provided pursuant to the Agreement when unbundled network elements are used for interoffice transport.

1.3 EEL Combinations

1.3.1 DS1 Interoffice Channel + DS1 Channelization + 2-wire VG Local Loop

1.3.2 DS1 Interoffice Channel + DS1 Channelization + 4-wire VG Local Loop

1.3.3 DS1 Interoffice Channel + DS1 Channelization + 2-wire ISDN Local Loop

1.3.4 DS1 Interoffice Channel + DS1 Channelization + 4-wire 56 kbps Local Loop

1.3.5 DS1 Interoffice Channel + DS1 Channelization + 4-wire 64 kbps Local Loop

1.3.6 DS1 Interoffice Channel + DS1 Local Loop

1.3.7 DS3 Interoffice Channel + DS3 Local Loop

1.3.8 STS-1 Interoffice Channel + STS-1 Local Loop

1.3.9 DS3 Interoffice Channel + DS3 Channelization + DS1 Local Loop

1.3.10 STS-1 Interoffice Channel + DS3 Channelization + DS1 Local Loop

1.3.11 2-wire VG Interoffice Channel + 2-wire VG Local Loop

1.3.12 4wire VG Interoffice Channel + 4-wire VG Local Loop

1.3.13 4-wire 56 kbps Interoffice Channel + 4-wire 56 kbps Local Loop

1.3.14 4-wire 64 kbps Interoffice Channel + 4-wire 64 kbps Local Loop

1.4 Special Access Service Conversions

NEXTLINK may not convert special access services to combinations of loop and transport network elements, whether or not NEXTLINK self-provides its entrance facilities (or obtains entrance facilities from a third party), unless NEXTLINK uses the combination to provide a "significant amount of local exchange service," to a particular customer, as defined in 1.4.1 below. To the extent NEXTLINK converts its special access services to combinations of loop and transport network elements at UNE prices, NEXTLINK, hereby, certifies that it is providing a significant amount of local exchange service over such combinations, as set forth in 1.4.1 below. If, based on audits performed as set forth in this section, BellSouth concludes that NEXTLINK is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in the Interconnection Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NEXTLINK. Notwithstanding any provision in the Parties interconnection agreement to the contrary, BellSouth may only conduct such audits as reasonably

necessary to determine whether NEXTLINK is providing a significant amount of local exchange service over facilities provided as combinations of loop and transport network elements, and, except where noncompliance has been found, BellSouth shall perform such audits no more than once each calendar year. BellSouth shall provide NEXTLINK and the FCC at least thirty days notice of any such audit, shall hire an independent auditor to perform such audit, and shall be responsible for all costs of said independent audit, unless noncompliance is found, in which case NEXTLINK shall be responsible for reimbursement to BellSouth for the reasonable costs of such audit. NEXTLINK shall cooperate with said auditor, and shall provide appropriate records from which said auditor can verify NEXTLINK's local usage certification as set forth in 1.4.1 below. In no event, however, shall BellSouth or its hired auditor require records other than those kept by NEXTLINK in the ordinary course of business.

1.4.1 EEL combinations for DS1 level and above will be available only when NEXTLINK provides and handles a significant amount of the end user's local exchange service. NEXTLINK shall be deemed to be providing a significant amount of the end user's local exchange service where NEXTLINK meets one of the three circumstances set forth in 1.4.1.1, 1.4.1.2, or 1.4.1.3 below. NEXTLINK hereby certifies that all requests for EEL combinations, existing or new, shall meet one of these circumstances. Should extraordinary circumstances exist where NEXTLINK is providing a significant amount of local exchange service to an end user but does not qualify under any of these three circumstances, NEXTLINK may petition the FCC for a waiver of these requirements.

1.4.1.1 NEXTLINK certifies that it is the exclusive provider of the end user's local exchange service. In such circumstance, the EEL combination(s) must terminate at NEXTLINK's collocation arrangement at at least one BellSouth Central Office. Such EEL combinations may not be connected to other BellSouth tariffed services. NEXTLINK may use the EEL combination(s) that serve that end user to carry any type of traffic; or

1.4.1.2 NEXTLINK certifies that it provides local exchange and exchange access service to the end user customer's premises and handles at least one third of the end user customer's local traffic measured as a percent of total end user customer local dialtone lines; and, for DS1 circuits and above, at least 50 percent of the activated channels on the loop portion of the EEL combination have at least 5 percent local voice traffic individually, and the entire loop facility has at least 10 percent local voice traffic. When such EEL combination includes multiplexing, each of the individual DS1 circuits must meet this criteria. In the circumstance set forth in this subsection, the EEL combination(s) must terminate at NEXTLINK's collocation arrangement in at least one BellSouth Central Office. Such EEL combinations may not be

connected to other BellSouth tariffed services. NEXTLINK may use such EEL combinations to provide other services to the end user, so long as the local usage criteria set forth in this subsection are met; or

- 1.4.1.3 NEXTLINK certifies that it provides originating and terminating local dialtone service on at least 50 percent of the activated channels on a circuit, and at least 50 percent of the traffic on each of these local dialtone channels is local voice traffic. Further, the entire loop facility must have at least 33 percent local voice traffic. When such EEL combination includes multiplexing, each of the individual DS1 circuits must meet this criteria. NEXTLINK does not need to provide a defined portion of the end user's local service, but the active channels, and the entire facility, must carry the amount of local exchange traffic specified in this option. In the circumstance set forth in this subsection, collocation is not required. Such EEL combinations may not be connected to other BellSouth tariffed services.

1.5 Rates

- 1.5.1 Subject to Section 1.2.3 preceding, for all other states, the non-recurring and recurring rates for the Currently Combined EEL combinations set forth in Section 1.3 and other Currently Combined network elements will be the sum of the recurring rates for the individual network elements plus a nonrecurring charge as set forth in Exhibit A to this Amendment. If a rate element is listed as NA in Exhibit A, then the appropriate individual UNE rate listed in Attachment 12 of the existing Interconnection Agreement will apply.

2. All of the other provisions of the Agreement, dated November 4, 1999 and approved by the Tennessee Regulatory Authority March 28, 2000 shall remain in full force and effect.
3. Either or both of the Parties is authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed by their respective duly authorized representatives on the date indicated below.

NEXTLINK Tennessee, Inc.

By: [Signature]

Name: R. Gerard Salemmme

Title: Senior Vice President

Date: 9-5-00

BellSouth Telecommunications, Inc.

By: [Signature]

Name: Jerry D. Hendrix

Title: Senior Director

Date: 9/5/00

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